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# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

*v.*

FRIEDA JOYCE JOHNSON, INDIVIDUALLY AND AS ADMINISTRATRIX FOR THE ESTATE OF HORTON JOHNSON, DECEASED

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

Whether the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), bars an action under the Federal Tort Claims Act brought on behalf of a serviceman killed during a military mission where the complaint alleges the negligence of civilian employees of the federal government who participated in the military mission.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-10a) is reported at 779 F.2d 1492. The opinion of the court of appeals (App., *infra,* 11a-34a) is reported at 749 F.2d 1530. The district court's order (App., *infra,* 35a) is unreported.

### JURISDICTION

The judgment of the court of appeals (App., *infra,* 33a) was entered on January 13, 1986. On April 3, 1986, Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

28 U.S.C. 1346(b) provides in part:

> Subject to the provisions of [28 U.S.C. 2671 *et seq.*], the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

## STATEMENT

1. Lieutenant Commander Horton Johnson was a helicopter pilot in the United States Coast Guard. The Coast Guard is "a military service and a branch of the armed forces of the United States" (14 U.S.C. 1) and is responsible for operating "rescue facilities for the promotion of safety on, under, and over the high seas * * * of the United States" (14 U.S.C. 2). In the early morning hours of January 7, 1982, Lieutenant Commander Johnson's Coast Guard station in Hawaii received a distress call from a boat lost in a storm. Lieutenant Commander Johnson and several other members of the Coast Guard responded to the call for assistance; he piloted a helicopter to the area from which the distress call had been received. Visibility during the storm was quite poor, and while searching for the boat Lieutenant Commander Johnson requested radar assistance from Federal Aviation Administration (FAA) air traffic controllers. The FAA air traffic controllers provided air traffic control services to

Lieutenant Commander Johnson's helicopter, but it crashed into a mountain and all on board died. App., *infra,* 12a.

Respondent, Lieutenant Commander Johnson's widow and the administratrix of his estate, applied for and received the full range of Veterans' Benefits payable as a result of Lieutenant Commander Johnson's death.[1] In addition, respondent brought this action in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.,* seeking damages from the United States. Respondent did not allege that Lieutenant Commander Johnson's fellow service members or superior officers acted negligently. Instead, respondent claimed that the FAA air traffic controllers negligently guided Lieutenant Commander Johnson's helicopter.

2. The district court dismissed the complaint because the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore is barred by *Feres* v. *United States,* 340 U.S. 135 (1950) (App., *infra,* 35a). The court of appeals reversed (App., *infra,* 11a-32a). The court of appeals did not dispute that Lieutenant Commander Johnson's death occurred incident to service. But, based on its review of this Court's *Feres* doctrine cases, the court concluded that "[t]his much-maligned doctrine" (App., *infra,* 27a) is based primarily upon "the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function" (*id.* at 28a). Applying this reasoning the court concluded that the *Feres* doctrine does not bar respondent's action because the complaint alleged the negligence of civilian FAA air traffic controllers only. In the court's view, putting on trial the

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[1] The Coast Guard advises us that respondent has received $35,690.66 in life insurance, a $3,000 death gratuity, and presently receives approximately $868 per month in dependency and compensatory benefits.

actions of civilian employees of the federal government involved in the rescue operation would not require scrutiny of military decisions or involve or compromise the military command structure (App., *infra,* 28a-29a).

The court acknowledged (App., *infra,* 29a) that its decision squarely conflicted with the Ninth Circuit's decision in *Uptegrove* v. *United States,* 600 F.2d 1248 (1979), cert. denied, 444 U.S. 1044 (1980). In *Uptegrove* a serviceman was killed when the Air Force cargo plane on which he was flying crashed, and the court concluded that the serviceman's survivor was barred by the *Feres* doctrine from alleging that the negligence of FAA air traffic controllers had caused the crash. The court below stated that "*Uptegrove* was wrongly decided" (App., *infra,* 30a).

3. The court of appeals granted the government's suggestion for rehearing en banc, but on rehearing reinstated the panel's opinion (App., *infra,* 2a). The court found that this Court's decision in *United States* v. *Shearer,* No. 84-194 (June 27, 1985), reinforced the panel's analysis. The court noted that the Court in *Shearer* placed a "[s]pecial emphasis * * * upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions" (App., *infra,* 2a-4a). Like the panel, the en banc court reasoned that the "claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration * * * who were not in any way involved in military activities" (App., *infra,* 5a) so that, in the court of appeals' view, a trial here would not require civilian courts to second-guess military decisions.

Judge Johnson, joined by Judges Tjoflat, Roney, and Hill, dissented. They would have affirmed the dismissal of the complaint on the basis that the injury to Lieutenant Commander Johnson arose out of activity incident to military service and therefore was barred by *Feres.* The majority's contrary result, Judge Johnson noted, directly

conflicted with the decisions of numerous other courts of appeals which have uniformly applied *Feres* to bar actions by service members based on the alleged negligence of civilian employees of the federal government (App., *infra,* 7a-8a). Judge Johnson also relied directly on this Court's *Feres* doctrine cases since the Court had never limited the application of *Feres* to military tortfeasors. Rather this Court has stated that " '*Feres* * * * held that an on-duty serviceman who is injured due to the negligence of *Government officials* may not recover against the United States under the Federal Tort Claims Act' " (App., *infra,* 10a (emphasis in original) (Johnson, J., dissenting), quoting *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 669 (1977)). Thus, Judge Johnson reasoned, the proper inquiry in this case is "whether or not [the] serviceman's injury was incident to service" (App., *infra,* 10a), and he concluded that Lieutenant Commander Johnson's death necessarily was incident to service since it occurred "in the course of duty on a regular Coast Guard mission" (*ibid.*).

**REASONS FOR GRANTING THE PETITION**

The court of appeals incorrectly decided a question of exceptional importance to all of the armed services and the federal agencies that regularly work with the armed services. The court's holding that a service member injured incident to military service may evade the *Feres* doctrine by alleging the negligence of civilian employees of the federal government involved in a military mission conflicts with the decisions of all of the other courts of appeals that have considered the issue and is inconsistent with the purposes and policies that underlie the *Feres* doctrine. The court of appeals' decision will have a substantial effect on the United States because military personnel frequently work jointly with civilian employees of the federal government (see pages 10-11, *infra*). Until the decision below, it was

clear that the *Feres* doctrine bars an FTCA action by a service member alleging negligence of a civilian government employee if the service member was injured incident to service. Given the pervasive nature of civilian involvement with the armed forces, it is inevitable that service members injured incident to service will now try frequently to circumvent *Feres* by alleging the negligence of federal civilian employees. Thus, if left to stand, the court of appeals' decision will greatly expand the liability of the United States for the injuries that inevitably occur in military activities. In these circumstances review of this recurring question is plainly warranted.

1. In *Feres* v. *United States,* 340 U.S. 135 (1950), the Court held that a service member "may not recover under the Federal Tort Claims Act for injuries which 'arise out of or are in the course of activity incident to service' " (*United States* v. *Shearer,* No. 84-194 (June 27, 1985), slip op. 4-5 (quoting *Feres,* 340 U.S. at 146)). That language clearly suggests that the proper inquiry is simply whether an injury occurred incident to service and that the status of the alleged tortfeasor is irrelevant. The panel below, whose decision was reinstated by the en banc court, expressly acknowledged (App., *infra,* 29a) that its holding conflicted with the Ninth Circuit's decision in *Uptegrove,* where the court held that a serviceman was barred from suing the United States on account of the alleged negligence of FAA air traffice controllers because the injury occurred incident to military service. In fact, as the dissenting judges below recognized (App., *infra,* 7a-8a), the courts of appeals have held without exception that the *Feres* doctrine bars FTCA actions by service members injured incident to service by the alleged negligence of civilian employees of the federal government. *Warner* v. *United States,* 720 F.2d 837 (5th Cir. 1983); *Carter* v. *City of Cheyenne,* 649 F.2d 827 (10th Cir. 1981); *Uptegrove* v. *United States, supra; Woodside* v. *United States,* 606 F.2d

134 (6th Cir. 1979), cert. denied, 445 U.S. 904 (1980); *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968), cert. denied, 393 U.S. 1053 (1969); *United Air Lines* v. *Wiener,* 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964); *Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Watkins* v. *United States,* 462 F. Supp. 980 (S.D. Ga. 1977), aff'd, 587 F.2d 279 (5th Cir. 1979). The court of appeals' ruling cannot be reconciled with these numerous decisions, many of which, like this case, involved claims by service members that FAA air traffic controllers acted negligently. See *Carter,* 649 F.2d at 828; *Uptegrove,* 600 F.2d at 1249; *Lee,* 400 F.2d at 559; *United Air Lines,* 335 F.2d at 396-397; *Layne,* 295 F.2d at 433.[2] Indeed, until the decision of the court of appeals, "no court * * * has allowed recovery against the government in this sort of suit" (App., *infra,* 7a (Johnson, J., dissenting)).[3]

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[2] Each of the cases cited as conflicting with the decision below involved a claim of negligence on the part of a civilian who was not employed by the Department of Defense or in the military chain of command. The courts of appeals have uniformly held that the *Feres* doctrine applies where a service member bases a claim on the actions of civilian employees of the United States who, unlike FAA personnel, are employed by the Department of Defense or are in the military chain of command (see, *e.g., Jaffee* v. *United States,* 663 F.2d 1226, 1238 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Hass* v. *United States,* 518 F.2d 1138, 1141 (4th Cir. 1975)), but we do not understand the court of appeals to have disagreed with such decisions. Cases alleging negligence on the part of civilians employed by the Department of Defense or in the military chain of command would fall into what the panel described as "the *Feres* factual paradigm" (App., *infra,* 25a), and therefore it appears that even the Eleventh Circuit would hold such suits barred by *Feres* if the injury occurred incident to military service.

[3] The district courts likewise are unanimous in holding that the *Feres* doctrine bars such a suit. *Gilardy* v. *United States,* No. 83-1277 (D. Hawaii June 13, 1984), appeal pending, No. 84-2269; *Sigler* v.

In uniformly holding such claims to be barred, the courts of appeals other than the court below have correctly applied this Court's *Feres* doctrine cases. Nothing in this Court's opinions suggests that the *Feres* doctrine bars only suits alleging negligence on the part of military personnel. To the contrary, although the plaintiffs in *Feres* were injured by other service members, the Court's opinion contained "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact" (*Sheppard,* 294 F. Supp. at 8). Indeed, rather than limiting its ruling to the tortious acts of fellow service members, the Court broadly ruled that "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*" (*Feres,* 340 U.S. at 141 (footnote omitted; emphasis added)). Similarly, in *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977), the Court, in holding that a private contractor who paid damages to a serviceman may not sue the United States for indemnity, reaffirmed that "[i]n *Feres* * * * the Court held that an on-duty serviceman who is injured *due to the negligence of Government officials* may not recover against the United States under the Federal Tort Claims Act" (431 U.S. at 669 (emphasis added)); see also *id.* at 673 ("at issue would be the degree of fault, if any, on the part of the *Government's agents* and the effect upon the serviceman's safety" (emphasis added)).[4]

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*LeVan,* 485 F. Supp. 185 (D. Md. 1980); *Frazier* v. *United States,* 372 F. Supp. 208 (M.D. Fla. 1973); *Sheppard* v. *United States,* 294 F. Supp. 7 (E.D. Pa. 1969). In *Gilardy* the en banc Ninth Circuit has stayed the appeal pending the disposition of the petition in this case.

[4] This Court's decision in *Brooks* v. *United States,* 337 U.S. 49 (1949), further buttresses the conclusion that the *Feres* doctrine applies to injuries incident to service caused by the alleged negligence of civilian employees of the federal government. In *Brooks* a serviceman was killed when his car was struck by a truck driven by a civilian

2. To support its departure from the decisions of the other courts of appeals, the court below relied on its analysis of the policies which underlie the *Feres* doctrine. We submit, however, that those policies clearly support the application of *Feres* to this case.

a. This Court recently stated that the *Feres* doctrine is " 'best explained by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty" ' " (*Shearer,* slip op. 5, quoting *United States* v. *Muniz,* 374 U.S. 150, 162 (1963)). The court of appeals concluded that these concerns were inapplicable in this case because respondent had alleged negligence on the part of civilians only. However, the court's belief that a trial here would not disrupt military discipline and effectiveness or call for scrutiny of military decisions is wholly unrealistic. Cases such as this will inevitably "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer*, slip op. 7) and "require

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employee of the United States (see *id.* at 50). The Court held that the serviceman could bring an FTCA action. However, the Court did not rely upon the fact that the tortfeasor was a civilian employee of the United States. Instead, the Court ignored the civilian status of the tortfeasor and focused on the fact that the injury occurred off-base while the serviceman was on leave and had no connection to the military—*i.e.*, that the injury was not "incident to * * * Brooks' service" (*id.* at 52). In subsequent decisions the Court has reaffirmed that the result in *Brooks* in no way hinged on the fact that the tortfeasor was a civilian employee of the government, by adverting only to the fact that the injury there was not incident to military service. See *Shearer,* slip op. 6; *United States* v. *Brown,* 348 U.S. 110, 113 (1954); see also *Hass* v. *United States,* 518 F.2d 1138, 1141-1142 n.4 (4th Cir. 1975).

members of the Armed Services to testify in court as to each other's decisions and actions" (*Stencel*, 431 U.S. at 673). Therefore, the court of appeals erred in permitting respondent to go forward with her claim; it should have affirmed the district court's dismissal of the case because Lieutenant Commander Johnson's death occurred incident to service.[5]

Civilians frequently play a critical role in numerous military missions and operations, as this case illustrates. In guiding Lieutenant Commander Johnson's helicopter, FAA air traffic controllers were called upon to assist in what was obviously a dangerous military operation. Indeed, civilian employees of the FAA frequently are called upon to participate in a wide range of important military operations. FAA air traffic controllers participate in war games and exercises and help to assure the defense of the nation by assisting the armed forces in the interception of unknown aircraft entering United States airspace. See FAA, U.S. Dep't of Transp., *Order 7610.4F: Special Military Operations* 36, 106, 123-124, 134 (Jan. 21, 1981).[6] FAA air traffic controllers also work closely with the Strategic Air Command; they assist in the guidance of United States' aircraft equipped to fire nuclear weapons and the guidance of those aircraft which direct the firing of our land-based nuclear missiles (*id.* at 32). FAA con-

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[5] As we will show (pages 11-14, *infra*), it is clear that military discipline and effectiveness would be hindered by a trial in this case. However, we do not think that courts should inquire in each case as to whether a trial will involve sensitive military affairs or require members of the armed forces to testify against each other. Rather, because trials arising from injuries occurring incident to military service will often disrupt military discipline and effectiveness, the courts of appeals have properly held (see pages 6-7, *supra*) that if an injury occurred incident to service then a claim against the government is barred, as the Court stated in *Feres*.

[6] We have lodged a copy of this FAA Order with the Clerk of the Court and served a copy on opposing counsel.

trollers frequently are stationed at military bases (*id.* at 29, 30), and even where military controllers are stationed at military facilities, FAA civilian controllers are responsible for evaluation and review of military control facilities (*id.* at 28). Thus, the FAA is involved in many of our nation's most important and sensitive military activities. As both the FAA and the armed services have concluded, "[t]he cooperation and active participation of the FAA is essential to the effective accomplishment of [these military] mission[s]" (*id.* at 40; see also *id.* at 17, 34, 36).[7]

It follows that allowing suits by service members against FAA air traffic controllers would disrupt a working relationship which is crucial to the general defense and national security and "would be just as disruptive of harmonious relations as would a suit against a fellow serviceman" (*Hass,* 518 F.2d at 1143). Disruption of this relationship would result from the tension that would inevitably arise when a service member hales into court those civilians who work in military operations. The Court in

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[7] Numerous other civilian agencies of the federal government work with the armed forces in a variety of military operations and activities, such as the Department of Energy (see 42 U.S.C. 2034-2038 (joint Department of Energy and military efforts to develop, manufacture, and store nuclear weapons)), the National Aeronautics and Space Administration (see 42 U.S.C. 2451(c)(6), 2473(c)(12); 42 U.S.C. (& Supp. II) 2452 (authorizing NASA to make available to the military discoveries having military significance, to undertake research on and construction of aircraft and missiles, and to enter into cooperative agreements with the armed services to permit military personnel to participate in NASA activities)), the Central Intelligence Agency (see 50 U.S.C. 403(d)(3); Exec. Order No. 12,333, §§ 1.11(d), 1.12, 3 C.F.R. 207-209 (1982) (CIA and military joint operations in intelligence activities)), the National Oceanic and Atmospheric Administration (see 10 U.S.C. 4537, 9537 (NOAA assistance to the military in making topographic surveys, making maps for military purposes, and researching and developing aerial photography)), and the Maritime Administration (see 46 U.S.C. 1125; 50 U.S.C. (& Supp. II) App. 1744 (acquisition of vessels for military use by the Maritime Administration with the approval of the Secretary of the Navy)).

*Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983) cautioned that in military life "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." To insure the success of military missions, it is important that civilians participating in the mission "be ready to provide an effective defense on a moment's notice" (*Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 5), and act without hesitation or debate. Permitting service members to challenge the decisions of civilians working with the armed services on military missions might cause some civilians to hesitate before acting and therefore interfere with military effectiveness.[8]

Apart from ignoring the ways in which this litigation would interfere with military effectiveness, the court of appeals erred in its suggestion (App., *infra*, 28a-29a) that since only the negligence of civilian employees was alleged, there will be no need for military officials to testify or for a court to scrutinize decisions made by military personnel. It would be impossible for a trier of fact to evaluate the conduct of the FAA air traffic controllers in this case without considering the military nature of the mission. At trial, the United States would be required to show that the FAA controllers acted reasonably, which would require

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[8] Additionally, if civilian negligence may be a basis for an FTCA action by a service member, it would arguably seem to follow that civilian employees may be liable for damages in their individual capacity in suits by service members. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983); *Uptegrove*, 600 F.2d at 1249. Calling civilians into court to account for decisions they made in a military mission and exposing them to damage awards in their individual capacity, while their military counterparts—who may be more responsible or culpable—are immune from scrutiny can only breed discord and tension in this important relationship. Certainly "it would be absurd to hold [civilians] responsible for conduct that may have been dictated by a [military] officer who is himself immune from liability" (*Hass*, 518 F.2d at 1143).

testimony describing the hazardous nature of the conditions, the extreme danger involved in any rescue mission, and the pressing need to fly in weather not suited for civilian aircraft—the peculiar demands of the military " 'without counterpart in civilian life' " (*Chappell,* 462 U.S. at 300, quoting *Schlesinger* v. *Councilman,* 420 U.S. 738, 757 (1975)). Such testimony would necessarily come from military personnel. Indeed, because under respondent's theory no liability could arise from the decisions of military personnel, to defend such cases the United States would be *forced* in some cases to place on trial military decisions—*i.e.,* to prove that the civilian defendants were not negligent but that the military officials were, since their negligence could not be a basis for liability. That would require superior officers and military personnel to testify regarding their own military decisions and the decisions of others and likewise demand that civilian courts assess the fault of military personnel. This intrusive inquiry obviously would be destructive of military morale and strike at the heart of the " 'peculiar and special relationship of the soldier to his superiors' " (*Shearer,* slip op. 5, (quoting *United States* v. *Muniz,* 374 U.S. at 162)).

Moreover, it is inevitable that cases involving dangerous military operations will raise questions of contributory negligence, again requiring service members to testify against each other and a judicial assessment of military judgments. In cases arising from military air accidents, pilot error will often be the cause of the accident. Therefore, in order to defend in some cases the United States would be required to argue that the pilot acted negligently, which might require the pilot's fellow service members and superior officers to second-guess the pilot's actions. And to rebut any adverse testimony from his superior officers and fellow soldiers, the service member might have to hale into court other superior officers or fellow soldiers to show that he or she acted prop-

erly, or that the other superior officers or fellow service members who testified were biased. It is difficult to conceive of a trial that would be more disruptive of the "established relationship between enlisted military personnel and their superior officers" (*Chappell,* 462 U.S. at 300).

The court of appeals concluded that military discipline and effectiveness would not be impaired because the FAA air traffic controllers "were not in any way involved in military activities" (App., *infra,* 5a). But that statement is refuted by the undisputed facts of this case. The FAA air traffic controllers were charged with aiding the Coast Guard—"a military service and a branch of the armed forces of the United States" (14 U.S.C. 1)—in what was clearly a dangerous military rescue mission.[9] Obviously, participation by such civilian employees contributes, in the aggregate, to the safety and effectiveness of such military operations—in comparison with attempting to carry out such operations without any help from civilian personnel (and thus with no possibility of a claim not barred by *Feres*). The reality is that, in carrying out military operations, the United States government acts as an entity and the armed services often rely upon civilian agencies for assistance. Thus, military activities are not simply the actions of the armed forces, but are interrelated actions taken by and on behalf of the United States through all of its agents. It follows that the rule in *Feres* cannot reasonably be limited only to claims of tortious conduct by military personnel, but must also include challenges to the

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[9] The court of appeals acknowledged that the *Feres* doctrine would bar an action where the tortfeasor is "a civilian employee engaged in activities usually associated with the armed forces" (App., *infra,* 25a). Given the facts of this case, as well as the numerous other military operations engaged in by the FAA, there can be no doubt that the court of appeals erred in concluding that the FAA controllers were not performing activities usually associated with the armed forces (*ibid.*).

conduct of civilians who are necessarily involved in activities "incident to military service." See *Carter,* 649 F.2d at 830-831; *Woodside,* 606 F.2d at 141; *Uptegrove,* 600 F.2d at 1250-1251; *Watkins,* 462 F. Supp. at 985; *Layne,* 295 F.2d at 435-436. The *Feres* doctrine therefore should be applied to bar respondent's action because it is "the *type* of claim[] that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness" (*Shearer,* slip op. 6-7 (emphasis in original)).

b. Apart from concerns about adverse effects on military discipline and effectiveness, the Court in *Feres* noted that service members injured incident to service receive compensation under the Veterans' Benefits Act, which provides "simple, certain, and uniform compensation for injuries or death of those in armed services" (*Feres,* 340 U.S. at 144 (footnote omitted)). After Lieutenant Commander Johnson's accident, respondent applied for and received the full range of Veterans' Benefits (see note 1, *supra;* see also 38 U.S.C. (& Supp. II) 301-362, 401-432, 701-788). This Court has stated that where a service member is injured incident to service, Veterans' Benefits are the "exclusive" and "sole remedy" (*Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 464 (1980)). In *Feres* the Court reasoned that because Congress, in enacting Veterans' Benefits statutes, has created "a comprehensive system of relief * * * for [service members] and their dependents" (340 U.S. at 140), Congress would not also have intended service members to recover under the FTCA for injuries incident to military service (see *id.* at 144; cf. *Chappell,* 462 U.S. at 302-303).[10] In *Stencel* the Court

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[10]In holding that Veterans' Benefits were the exclusive remedy for injuries incident to service, the Court in *Feres* distinguished its prior decision in *Brooks,* where a serviceman had been paid Veterans' Benefits for an injury but nonetheless was allowed to maintain an

stressed that "the Veterans' Benefits Act establishes, as a *substitute for tort liability,* a statutory 'no fault' compensation scheme * * * * * [that] provides an upper limit of liability for the Government as to service-connected injuries" (431 U.S. at 671, 673 (emphasis added)).

In disregarding respondent's receipt of Veterans' Benefits,[11] the court of appeals' decision contravenes the important policies which underlie the comprehensive statutory compensation scheme. Activities that are incident to service are likely to be extremely dangerous, as this case illustrates. Lieutenant Commander Johnson was called upon to participate in a military rescue operation and, unfortunately, injuries inevitably arise out of such risky operations. The court of appeals' opinion, which exposes the United States to damages for injuries incident to such hazardous military missions, removes the " 'protective mantle of the Act's limitation-of-liability provisions' " (*Stencel,* 431 U.S. at 673, quoting *Cooper Stevedoring Co. v. Kopke, Inc.,* 417 U.S. 106, 115 (1974)), and thereby "frustrat[es] one of the essential features of [that scheme]" (*ibid.*) in cases where the injury can be traced to the negligence of a civilian working with the military.

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FTCA action. The Court in *Feres* saw as a "vital distinction" (*Feres,* 340 U.S. at 146) the fact that "[t]he injury to Brooks did not arise out of or in the course of military duty" (*ibid.*).

[11] The court of appeals rejected respondent's claim that the receipt of Veterans' Benefits is irrelevant in applying *Feres* (App., *infra,* 20a-21a & n.4), but the court nonetheless disregarded the fact that respondent is receiving Veterans' Benefits in reaching its decision. This Court has cautioned that factors other than the concern with military discipline and effectiveness are "no longer controlling" in *Feres* doctrine cases (*Shearer,* slip op. 6 n.4). But that hardly indicates that they may be totally disregarded. Indeed, this Court and the courts of appeals have repeatedly relied on the fact that a plaintiff is receiving Veterans' Benefits in applying *Feres.* See *Shearer,* slip op. 6 n.4; *Stencel,* 431 U.S. at 672-673; *Carter,* 649 F.2d at 830; *Jaffee,* 663 F.2d at 1228; *Uptegrove,* 600 F.2d at 1250.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1986

**APPENDIX A**

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 83-5764.

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

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## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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Jan. 13, 1986.

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Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Frieda Joyce Johnson, respondent, brought this wrongful death action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband, a helicopter pilot for the United States Coast Guard dispatched to search for a civilian boat, died as a result of the negligence of civilian Federal Aviation Administration air traffic controllers who had assumed control over the helicopter when inclement weather prevented visual navigation. The district court, relying on *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct.

153, 95 L.Ed. 152 (1950), granted the government's motion to dismiss. The court of appeals reversed. 749 F.2d 1530 (11th Cir. 1985). On April 24, 1985, we granted the government's suggestion that this matter be reviewed by the *en banc* court. 760 F.2d 244 (11th Cir. 1985). Such action vacated the panel opinion. Upon consideration by the full court, the panel opinion found at 749 F.2d 1530 (11th Cir. 1985) is reinstated.

As noted in footnote 13 of the panel opinion, the Supreme Court granted certiorari in the case of *Shearer* v. *United States,* 723 F.2d 1102 (3rd Cir. 1983), *cert. granted,* ____ U.S. ____, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984). On June 27, 1985, the Court announced its opinion in that case, ____ U.S. ____, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985). The opinion of the Supreme Court is most helpful to our decision herein and reinforces the analysis set forth in the panel opinion.

*Shearer* involved the death of an Army private, who, while off duty, was kidnapped and murdered by another serviceman who was also off duty and away from his base. The claim made under the Federal Tort Claims Act was that although the Army knew that the other serviceman was dangerous it negligently failed to control him or warn others about him. The government contended that the suit was barred by both 28 U.S.C. § 2680(h) (waiver of sovereign immunity under the Federal Tort Claims Act not applicable to claims arising out of assault and battery) and the *Feres* doctrine. Only four members of the Court found § 2680(h) applicable. Section II B of the opinion, which discussed the *Feres* doctrine, was joined in by eight members of the Court (Justice Powell did not participate in the case).[1] Special emphasis is placed upon military

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[1] 1. Section II B reads:

Our holding in *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), was that a soldier may not recover under the

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Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.*, at 146, 71 S.Ct. at 159. Although the Court in *Feres* based its decision on several grounds,

> "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' " *United States* v. *Muniz*, 374 U.S. 150, 162 [83 S.Ct. 1850, 1857, 10 L.Ed.2d 805] (1963), quoting *United States* v. *Brown*, 348 U.S. 110, 112 [75 S.Ct. 141, 143, 99 L.Ed. 139] (1954).

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977), and whether the suit might impair essential military discipline, see *Chappell* v. *Wallace*, 462 U.S. 296, 300, 304, 103 S.Ct. 2362, 2365, 2367, 76 L.Ed.2d 586 (1983).

Respondent's complaint strikes at the core of these concerns [footnote omitted]. In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." App. 14. This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman [footnote ommitted].

Respondent's case is therefore quite different from *Brooks* v. *United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), where the Court allowed recovery under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra*, 431 U.S. at 673, 97 S.Ct. at 2058. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a

discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions. In *Shearer,* the Court concluded that the "[r]espondents complaint strikes at the core of these concerns" and held the claims barred by the *Feres* doctrine. ____ U.S. at ____, 105 S.Ct. at 3043 (footnote omitted).

Writing for the majority, the Chief Justice noted,

> "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."

*Id.* Following this command, we find that the panel opinion has given proper consideration to the *Feres* factors with particular attention to whether or not the claims asserted here will implicate civilian courts in conflicts in-

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civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell* v. *Wallace,* such "complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S., at 302, 103 S.Ct. at 2366 quoting *Gilligan* v. *Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973).

Finally, respondent does not escape the *Feres* net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of Oral Arg. 37. By whatever name it is called, it is a decision of command. The plaintiffs in *Feres* and *Stencel Aero Engineering* did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly, respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail. ____U.S. at ____, 105 S.Ct. at 3043-44.

volving the military structure or military decisions. The claims presented are based solely upon the conduct of civilian employees of the Federal Aviation Administration (a civilian administration within the Department of Transportation) who were not in any way involved in military activities. The fact that the decedent was a helicopter pilot for the United States Coast Guard is not sufficient, standing alone, to activate the *Feres* preclusion.

The judgment of the district court is REVERSED.

JOHNSON, Circuit Judge, dissenting in which TJOFLAT, RONEY, and HILL, Circuit Judges, join.

I respectfully dissent from the decision of this Court.

This case concerns a Coast Guard helicopter pilot who was killed while on a military mission in a crash allegedly caused by civilian FAA air controller negligence. Since the suit brought by this serviceman's survivor is against the United States, we are bound by the dictates of the *Feres* doctrine, which exempts the government from suit where an injury to a serviceman is "incident to service." Here, Johnson's injury was undoubtedly sustained incident to service, so under current law our decision ought to be a relatively straightforward affirmance. However, the majority finds a novel way to evade the commands of the Supreme Court—and of Fifth Circuit precedent binding on this Court—in order to reverse and allow recovery.

In the panel opinion reinstated by the full court after *en banc* consideration, the majority determines that this Court henceforth will not make the standard *Feres* inquiry—whether or not the injury was incident to service—unless something that it calls "the *Feres* factual paradigm" is present. *Johnson* v. *United States,* 749 F.2d 1530, 1537 (11th Cir. 1985). That paradigm is said to be "an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces." *Id.* Where the paradigm does not appear, this

Court must now undertake a case-by-case assessment of each rationale behind the *Feres* doctrine to determine whether the suit in question would undercut the purposes of the FTCA. *Id.*

The majority appears to find grounds for this extraordinary methodology in a handful of cases in which courts have returned to the *Feres* rationales to examine novel situations. See *Chappell* v. *Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983) (black servicemen barred from suing military for damages for constitutional violations); *Stencel Aero Engineering* v. *United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977) (no third party indemnification from United States where direct suit of injured party barred by *Feres*); *United States* v. *Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963) (*Feres* does not bar prisoners' suits against United States for injuries sustained in federal prison); *Hunt* v. *United States,* 636 F.2d 580 (D.C. Cir. 1980) (manufacturer sued by servicemen unjured by defective swine flu vaccine not barred by *Feres* from bringing in United States as substitute defendant under unique liability scheme of Swine Flu Act). The majority's own opinion suggests that it is undesirable to apply these rationales case-by-case in any but extremely unusual situations. *Johnson,* 749 F.2d at 1537 ("the [*Feres*] rationales are more relevant to the wisdom of implying [sic] an exception to the FTCA in the first instance, than they are to determining whether, given a particular factual situation, a servicemen was injured 'incident to service' "). Compare *Henninger* v. *United States,* 473 F.2d 814 (9th Cir. 1973) ("[t]o determine the effect that a particular type of suit might have upon military discipline would be an exceedingly complex task. . . . [N]early every case would have to be litigated, and it is the suit, not the recovery, that would be disruptive of discipline and the orderly conduct of military affairs").[1]

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[1] The Supreme Court in *Shearer* v. *United States,* ____ U.S. ____, 105 S.Ct. 3039, 3043, 87 L.Ed.2d 38 (1985), recently said, as the ma-

However, cases in which a serviceman was injured incident to service by a civilian government employee are hardly novel. This fact pattern has appeared consistently over the years. And just as consistently, no court until now has allowed recovery against the government in this sort of suit. See *Potts* v. *United States,* 723 F.2d 20 (6th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S.Ct. 2172, 80 L.Ed.2d 555 (1984) (Navy corpsman injured when struck by broken cable from hoist operated by civilians); *Warner* v. *United States,* 720 F.2d 837 (5th Cir. 1983) (off-duty Army enlisted man injured on base when motorcycle collided with shuttle bus driven by civilian government employee); *Jaffee* v. *United States,* 663 F.2d 1226 (3d Cir. 1981) (*en banc*), *cert. denied,* 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982) (serviceman injured by radiation exposure allegedly due in part to intentional tort of civilian Department of Defense and Atomic Energy Commission employees); *Lewis* v. *United States,* 663 F.2d 889 (9th Cir. 1981) (Marine Corps pilot killed in crash allegedly due to negligence of government maintenance employees); *Carter* v. *Cheyenne,* 649 F.2d 827 (10th Cir. 1981) (Air Force captain killed in crash at city airport for which city brought third-party claim against FAA controllers); *Woodside* v. *United States,* 606 F.2d 134 (6th Cir. 1979), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980) (Air Force officer killed in crash of plane allegedly due to negligence of civilian flight instruc-

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jority notes, that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed in *Feres* and subsequent cases." The majority seems to read this comment as condoning case-by-case application of the *Feres* rationales. This is too broad an interpretation. The bright-line rule that the *Shearer* Court specifically rejects is the use of "the situs of the murder" as determinative. Beyond this, the Court simply affirms that each case should be examined in light of the traditional application of the exception—*not* that each case should be scrutinized under each *Feres* rationale originally supporting the FTCA exception.

tor employed by military flight club); *Uptegrove* v. *United States,* 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980) (serviceman killed in crash of Air Force transport due to alleged negligence of FAA air traffic controller); *Watkins* v. *United States,* 462 F.Supp. 980, *aff'd on opinion below,* 587 F.2d 279 (5th Cir. 1979) (serviceman killed on base when motorcycle collided with shuttle bus driven by civilian government employee); *Hass* v. *United States,* 518 F.2d 1138 (4th Cir. 1975) (Marine sued government, charging civilian managers of Marine stable with negligence); *Certain Underwriters at Lloyd's* v. *United States,* 511 F.2d 159 (5th Cir. 1975) (suit by insuror of serviceman injured through malpractice of Public Health Service employees barred); *Bankston* v. *United States,* 480 F.2d 495 (5th Cir. 1973) (serviceman injured through Public Health Service employee malpractice); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968) serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence); *Sheppard* v. *United States,* 369 F.2d 272 (3d Cir. 1966), *cert. denied,* 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967) (serviceman killed in crash of military aircraft allegedly due to FAA air controller negligence) (companion case to *Lee, supra); Layne* v. *United States,* 295 F.2d 433 (7th Cir. 1961), *cert. denied,* 368 U.S. 990, 82 S.Ct. 605, 7 L.Ed.2d 527 (1962) (National Guardsman killed on training flight due to negligence of civilian air controllers); *United Air Lines* v. *Wiener,* 335 F.2d 379 (9th Cir. 1964), *cert. denied sub nom. United Airlines, Inc.* v. *United States,* 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964) (serviceman injured in part due to CAA employee negligence).

These cases are consistent with the Supreme Court's opinion in *Brooks* v. *United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed.1200 (1949), in which a serviceman was injured in an auto collision with a civilian employee of the

Army. The civilian status of the tortfeasor was apparently immaterial to the Court's decision—the only question analyzed was whether the injury was "incident to service." *See also Hass,* 518 F.2d at 1141-42 n.4 ("[i]n *Brooks* the Army truck that hit claimants' car was driven by a civilian, but the Supreme Court simply mentioned that fact in passing and placed no emphasis on it in reaching a decision").

The former Fifth Circuit cases cited above, *Watkins, Certain Underwriters,* and *Bankston,* are precedents binding on this Circuit. The majority unaccountably does not trouble to distinguish, or even to discuss, these cases. *Watkins,* which involved a suit by a serviceman injured when his motorcycle collided with a shuttle bus driven by a civilian government employee, is particularly relevant. There, the former Fifth Circuit concluded that "the fact that the injury was inflicted by non-military personnel does not bar operation of the *Feres* doctrine." *Watkins,* 462 F.Supp. at 985. What was true for Watkins is no less true for Johnson.

But even if this court simply ignores precedent—even if we decline, as the *Shearer* Court enjoins us, to examine each case in the light of the statute as it has historically been construed and accept the majority's unprecedented case-by-case methodology—the decision of the court below should be affirmed. For this case clearly would fall within the so-called "*Feres* factual paradigm" if the latter were properly framed.

In the cases considered by the *Feres* Court all three plaintiffs were injured by other servicemen. But the Court's holding was not limited to military tortfeasors. The Court said: "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or *the Government he is serving.*" *Feres* v. *United States,* 340 U.S. 135, 141, 71 S.Ct. 153, 157, 95 L.Ed. 152 (1950) (emphasis added). The Court further confirmed in *Stencel Aero Engineering*

*Corp.*, 431 U.S. at 669, 97 S.Ct. at 2056 (emphasis added), that "[i]n *Feres* . . . the Court held that an on-duty serviceman who is injured due to the negligence of *Government officials* may not recover against the United States under the Federal Tort Claims Act." As the lower court in *Sheppard* noted, the Court's ruling in *Feres* contains "no reference, except as a mere statement of fact, to the military status of the primary tort feasors, and certainly no reliance on that fact." *Sheppard* v. *United States,* 294 F.Supp. 7, 8 (E.D.Pa. 1969), *aff'd,* 369 F.2d 272 (3d Cir. 1966), *cert. denied,* 386 U.S. 982, 87 S.Ct. 1286, 18 L.Ed.2d 230 (1967).

An exception to the FTCA must logically cover *all* government employees, since that Act concerns claims based on "the negligent or wrongful act or omission of *any employee of the Government*." Tort Claims Act, 28 U.S.C.A. § 1346(b) (1976) (emphasis added). As the Ninth Circuit said in *United States* v. *Lee,* 400 F.2d at 562:

> In the ordinary Tort Claim case, where a person with civilian status is injured or dies, the claimant has his rights under the Tort Claims Act, regardless of the civilian or military status of the individual tortfeasor. An agent of the government has committed the wrong and the government is held liable. There is no logical distinction between the status of the civilian or the military tortfeasor.

In short, the true *Feres* factual paradigm is a case in which injury to a serviceman is caused by *any* government employee. This suit falls squarely within that paradigm. The proper inquiry remaining to this Court is simply whether or not this serviceman's injury was incident to service. Since Johnson was killed in the course of duty on a regular Coast Guard mission, I conclude that his death was indeed incident to service.

Accordingy, I dissent.

**APPENDIX B**

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 83-5764.

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

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## APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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Jan. 10, 1985.

Rehearing and Rehearing En Banc Denied March 26, 1985.[*]

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Before FAY and VANCE, Circuit Judges, and MAC MAHON*, District Judge.

FAY, Circuit Judge:

Frieda Joyce Johnson, plaintiff, brought this wrongful death action against the United States under the Federal Tort Claims Act (FTCA) 28 U.S.C. §§ 1346, 2671-2680. She alleges that her husband died as a result of the negligence of air traffic controller employed by the

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[* The court of appeals subsequently granted rehearing en banc. See page 2a, *supra*.]

* Honorable Lloyd F. MacMahon, U.S. District Judge for the Southern District of New York, sitting by designation.

Federal Aviation Administration (FAA). The district court, relying on *Feres* v. *United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), granted the Government's motion to dismiss. We reverse.

FACTUAL BACKGROUND[1]

Plaintiff's decedent, Horton Winfield Johnson, was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. On January 7, 1982, Johnson and his aircraft were dispatched to search for a civilian boat in distress. Because inclement weather made visual navigation impossible, Johnson requested the civilian FAA controllers to assume positive radar control over the helicopter. The controllers did so and undertook guidance from the ground. Unfortunately, the helicopter was vectored into the side of a mountain on the island of Molokai. Johnson was killed in the crash.

After exhausting her administrative remedies, plaintiff brought this action on behalf of herself, her minor children, and her husband's estate, alleging negligence on the part of the civilian FAA air traffic controllers. The Government filed a motion to dismiss, arguing that since plaintiff's decedent was killed while acting within the course and scope of his military duties, the complaint failed to state a claim upon which relief could be granted under the FTCA. The district court agreed, citing only *Feres,* and dismissed the action with prejudice.[2]

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[1] Properly viewed, this case involves an appeal from an order dismissing the action for want of jurisdiction. See *infra* note 2. We therefore accept as true, for purposes of this appeal, the factual allegations contained in plaintiff's complaint. See *Radovich* v. *Nat'l Football League,* 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); *Eaton* v. *Dorchester Dev., Inc.,* 692 F.2d 727 (11th Cir. 1982).

[2] We note that the Government erroneously contended that since the *Feres* doctrine barred plaintiff's suit, the complaint failed to state a claim upon which relief could be granted. The law is clear that "since a defense based on the *Feres* doctrine is premised on the notion that

## THE *FERES* DOCTRINE

Under the common law, the United States was shielded from suit by the doctrine of sovereign immunity. *See Feres,* 340 U.S. at 139, 71 S.Ct. at 156. In 1946, however, Congress enacted the FTCA, thus marking "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Id.* The FTCA provides that the United States is liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. It also vests in the district courts exclusive jurisdiction over civil actions against the United States based on the alleged negligence of government employees "where the United States, if a private person, would be liable to the claimant [under] the law of the place where the [negligence] occurred." *Id.* § 1346(b). This consent to suit, however, was not unlimited. Congress listed exceptions to the applicability of the FTCA, *see id.* § 2680, one of which excludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). The text of the act does not mention a blanket prohibition on actions brought by servicemen qua servicemen, yet "the courts rushed in where legislators feared to tread." *Parker* v. *United States,* 611 F.2d 1007, 1009 (5th Cir. 1980).

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there is no jurisdiction to hear the claim as the United States has not waived sovereign immunity for that kind of suit, such [a defense] should be raised by a motion to dismiss for lack of subject matter jurisdiction." *Stanley* v. *Central Intelligence Agency,* 639 F.2d 1116, 1157 (5th Cir. 1981). It follows that a court which accepts the *Feres* doctrine defense should not also attempt to adjudicate the merits of the case. *Id.* at 1157. This, however, is precisely what occurred when the district court dismissed plaintiff's complaint with prejudice, because "[a] dismissal for failure to state a claim is a disposition on the merits." *Id.* at 1158. In light of our holding, this error is of no consequence.

Soon after the FTCA was enacted, the Supreme Court was called upon to determine the statute's impact upon suits brought by servicemen or their survivors against the United States. In *Brooks* v. *United States,* 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), a serviceman was injured when an army truck collided on a public highway with the civilian automobile in which he was a passenger. The court characterized the injury as one not incurred incident to service, and held that the clear language of the FTCA authorized the serviceman's negligence action against the United States. *Id.* at 51-52, 69 S.Ct. at 919-920.

Shortly after *Brooks* was decided, the Supreme Court had occasion to address the applicability of the FTCA to a factual situation not before the Court in *Brooks,* to wit, a suit against the United States when "each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces." *Feres,* 340 U.S. at 138, 71 S.Ct. at 155.[3] The court in *Feres* held that the FTCA did not waive the Government's sovereign immunity for injuries to members of the armed services where the injuries arose out of or were in the course of activity incident to service. *Id.* at 146, 71 S.Ct. at 159. The court offered the following bases for its holding: (1) the absence of parallel private liability; (2) the belief that since state law must be consulted under the FTCA, it would be irrational to leave servicemen injured by others in the military dependent upon geographic considerations over which they have no control; (3) the "distinctively federal

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[3] The *Feres* decision actually involved three actions against the United States. The *Feres* case was a wrongful death action brought by the executrix of Feres' estate in which, *inter alia,* it was alleged that Feres was negligently quartered in a barracks having a defective heating plant. *Feres,* 340 U.S. at 136-37, 71 S.Ct. at 154-55. In *Jefferson* v *United States* and *United States* v. *Griggs,* the plaintiffs alleged medical malpractice on the part of military physicians. *Id.* at 137, 71 S.Ct. at 155.

character" of the relationship between the United States and those in the military; and (4) the availability of a no-fault compensation system. *Id.* at 141-46, 71 S.Ct. at 156-59.

Four years after *Feres,* the Supreme Court decided *United States* v. *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (1954). In that case Veterans Administration doctors operated on the knee of a veteran; the knee had been injured while he was on active duty. The veteran brought suit, alleging negligent medical treatment. Despite the fact that the veteran received enhanced disability benefits as a result of the surgery, the court held that his FTCA claim was not barred since the injury sued on occurred after he was discharged from service. *Id.* at 111-112, 75 S.Ct. at 142-143. The most significant aspect of the *Brown* case is not its holding; rather, it is the following statement which has come to be regarded as the single most important, and defensible, rationale for the *Feres* doctrine which has emerged as *Brown's* most significant contribution:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

*Brown,* 348 U.S. at 112, 75 S.Ct. at 143.

Some of the theoretical underpinnings of the *Feres* decision fell on hard times after *Brown.* For example, the view that the FTCA did not contemplate the creation of a "novel and unprecedented," *Feres,* 340 U.S. at 141, 71 S.Ct. at 157, cause of action against the United States was undermined in *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), and *Rayonier*

*Inc.* v. *United States,* 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354 (1957). In *Indian Towing,* the Supreme Court refused to bar an FTCA claim based on the alleged negligence of the Coast Guard in operating a lighthouse beacon. Over a vigorous dissent arguing the applicability of *Feres, see Indian Towing,* 350 U.S. at 70, 76 S.Ct. at 127 (Reed, J., dissenting, joined by Burton, Clark, & Minton, J.J.), the court expressly rejected the Government's contention that the FTCA excluded claims based on the negligent performance of an activity unique to the government. *Id.* at 66-69, 76 S.Ct. at 125-127. The court reasoned that to premise FTCA liability on the "completely fortuitous circumstance" of "the presence or absence of identical private activity" would be to "attribut[e] bizarre motives to Congress." *Id.* at 67, 76 S.Ct. at 125. Similarly, in *Rayonier,* where the court held that an FTCA action could be maintained for the alleged negligence of federal firefighters, the court stated:

> It may be that it is "novel and unprecedented" to hold the United States accountable for the negligence of its firefighters, but *the very purpose of the Tort Claims Act was* to waive the Government's traditional all-encompassing immunity from tort actions and *to establish novel and unprecedented governmental liability.*

*Rayonier,* 352 U.S. at 319, 77 S.Ct. at 377 (emphasis added).

The continued viability of the *Feres* doctrine was again questioned, albeit implicitly, in *United States* v. *Muniz,* 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), where the Supreme Court was asked to decide whether a federal prison inmate could sue under the FTCA for personal injuries sustained while incarcerated. The Government argued that both *Feres* and the potential adverse effect liability would have on prison discipline warranted implying an exception to the FTCA so as to bar prisoner claims.

Although it was careful not to question the *Feres* doctrine in the military context, *see id.* at 159, 83 S.Ct. at 1856, the court's reasoning can arguably be seen as further erosion of the doctrine's supporting rationales. The court echoed the *Rayonier* conclusion that the absence of analogous private liability was no impediment to FTCA liability, *id.* (citing *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139), and also noted that "the presence of a compensation system . . . does not of necessity preclude a suit for negligence." *Muniz,* 374 U.S. at 160, 83 S.Ct. at 1856. Further, the court regarded the supposed adverse effect diverse state personal injury laws would have on prison administration as "more a matter of conjecture than reality," *id.* at 161, 83 S.Ct. at 1856, and the Government's fear that some prisoners might be prejudiced by a non-uniform right to recover was seen by the court as no excuse for denying them recovery altogether. *Id.* at 162, 83 S.Ct. at 1857. Finally, the court invoked the gloss placed on *Feres* in *Brown,* and stated that *Feres* was "best explained" by the fear of what might happen if FTCA suits questioning orders given or acts committed in the course of military duty were allowed, as well as the effect intramilitary litigation might have on the soldier-superior relationship and military discipline. *Id.* (quoting *Brown,* 348 U.S. at 112, 75 S.Ct. at 143). Applying this "explanation" to the facts before it, the court in *Muniz* concluded that while it was possible that litigating prisoner claims would damage prison discipline, the spectre raised by the Government was more hypothetical than real. *Muniz,* 374 U.S. at 163, 83 S.Ct. at 1858. The court accordingly allowed the plaintiff to pursue his FTCA claim.

Despite the apparent inroads on the theoretical predicates of the *Feres* doctrine, *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), made it abundantly clear that the doctrine "refused to die the quiet death that some had an-

ticipated." *Hunt* v. *United States,* 636 F.2d 580, 588 (D.C. Cir. 1980). In *Stencel,* a serviceman injured when an aircraft ejection system malfunctioned brought suit against the United States and Stencel, the manufacturer of the system. Stencel cross-claimed against the Government for indemnity alleging, *inter alia,* that any malfunction in the ejection system was due to the Government's provision of faulty specifications, requirements, and components. Both the district court and the Eighth Circuit concluded that the serviceman's claim against the United States and Stencel's cross-claim were barred by the *Feres* doctrine. *Stencel,* 431 U.S. at 669, 97 S.Ct. at 2056. Stencel appealed.

To decide whether to allow Stencel's cross-claim when the serviceman's claim against the Government was barred by the *Feres* doctrine, *see id.* at 673, 97 S.Ct. at 2058-2059, the court found it necessary to examine the doctrine's supporting rationales. In doing so, the court "dusted off and reasserted," *Parker,* 611 F.2d at 1011, some of the factors mentioned in *Feres* and thought discredited by intervening decisions. *See id. Hunt,* 636 F.2d at 588. The court identified three factors it apparently considering controlling in *Feres* doctrine analysis: (1) the distinctively federal character of the relationship between the soldier and the sovereign; (2) the existence of a no-fault statutory compensation scheme which serves as a substitute for governmental tort liability; and (3) the *Brown* court's concern about the effect on the military disciplinary structure that would obtain if tort litigation were countenanced. *Stencel,* 431 U.S. at 670-73, 97 S.Ct. at 2057-59. The court applied each of these factors to the cross-claim indemnity situation, and concluded that the FTCA did not authorize Stencel's claim "for essentially the same reasons that the direct action by [the serviceman] is barred by *Feres.*" *Id.* at 673, 97 S.Ct. at 2059.

That *Stencel* was not a jurisprudential aberration was recently confirmed in *Chappell* v. *Wallace,* 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 568 (1983). In that case, five Navy enlisted men who served on board a combat vessel brought suit against several of their superiors, alleging unconstitutional discrimination. The court acknowledged that *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), authorized damage suits against federal officials for constitutional violations in the absence of "special factors counselling hesitation." *Chappell,* 103 S.Ct. at 2364 (quoting *Bivens,* 403 U.S. at 396, 91 S.Ct. at 2005). The court therefore undertook to locate any such factors. Enter *Feres.*

The court in *Chappell* found that "[t]he 'special factors' that bear on the propriety of [plaintiffs'] *Bivens* action also formed the basis of this Court's decision in *Feres.*" *Chappell,* 103 S.Ct. at 2364. It then catalogued three of the bases of the *Feres* doctrine: (1) the lack of congressional intent to create a new cause of action with the FTCA; (2) the existence of a statutory compensation system for members of the armed services who are injured or killed; and (3) the unique relationship of the soldier to his superior, and the effect of intramilitary litigation on discipline. *Id.* at 2364-65. Although the court in *Chappell* referred to these three rationales for the *Feres* doctrine as guiding its analysis, its emphasis was clearly on the third factor. *See Brown* v. *United States,* 739 F.2d 362, 365 (8th Cir. 1984). The court focused its analysis on the military's unique need for discipline, the existence of military alternatives to civilian judicial review, and Congress' plenary constitutional authority over the military, and concluded that "special factors" did indeed militate against providing enlisted military personnel a *Biven's*-type remedy against their superiors. *Chappell,* 103 S.Ct. at 2367.

Regardless of the "widespread, almost universal criticism of *Feres* by the lower federal courts and commentators." *In re "Agent Orange" Product Liability Litigation,* 580 F.Supp. 1242, 1246-47 (E.D.N.Y. 1984) (citing *Hinkie* v. *United States,* 715 F.2d 96 (3d Cir. 1983), *cert. denied,* ____U.S. ____, 104 S.Ct. 1276, 79 L.Ed.2d 680 (1984); *Scales* v. *United States,* 685 F.2d 970 (5th Cir. 1982), *cert. denied,* 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983); *Hunt,* 636 F.2d 580; *Veillette* v. *United States,* 615 F.2d 505 (9th Cir. 1980); *Peluso* v. *United States,* 474 F.2d 605 (3d Cir.), *cert. denied,* 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L.Rev. 316 (1954); Rhodes, The *Feres* Doctrine After Twenty-Five Years, 18 A.F.L. Rev. 24 (1976); Note, From *Feres* to *Stencel;* Should Military Personnel Have Access to FTCA Recovery?, 77 Mich.L.Rev. 1099 (1977)), it nonetheless "is beyond question that it is the law." *Brown,* 739 F.2d at 365 (quoting *Laswell* v. *Brown,* 683 F.2d 261, 265 (8th Cir. 1982), *cert. denied,* 459 U.S. 1210, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983)). We now turn to its application to the facts of this case.

**APPLICATION OF *FERES* DOCTRINE**

Plaintiff asserts that, despite *Stencel,* we should bite the bullet, so to speak, and jettison those rationales for the *Feres* doctrine which have been criticized over the years. According to plaintiff, whenever a court is faced with a *Feres* doctrine defense, the inquiry should be limited to the effect maintenance of the suit would have on the military disciplinary structure.[4] Since litigating her FTCA claim,

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[4] In support of this view, plaintiff contends that *Chappell* "mentions only the military discipline rationale of *Feres*, and therefore implicitly disavows the first two makeweights historically mustered in support of the *Feres* doctrine." Reply Brief of Appellant at 6. What we

which is based solely on the conduct of civilians performing a civilian service, *see infra* note 10, will not implicate "[t]he most compelling rationale for the *Feres* doctrine," *Brown,* 739 F.2d at 365, plaintiff contends that the district court should be reversed. The Government, on the other hand, essentially argues that plaintiff's suit is barred simply because her decedent was killed while performing a Coast Guard mission;[5] that the alleged tortfeasors are

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are not free to do, however, is ignore three crucial facts. First, the *Chappell* court did not confine its discussion of *Feres* to the military discipline rationale. *See supra* p. 1535. The *Chappell* court specifically referred to the *Feres* court's "focus[] on the unique relationship between the government and military presonnel." *Chappell,* 103 S.Ct. at 2365, when that court held that the FTCA did not create a new cause of action against the United States. Further, the *Chappell* court noted that the *Feres* decision was influenced by congressional " 'enactments . . . which provide systems of simple, certain, and uniform compensation for injuries or death of those in the armed services.' " *Id.* (quoting *Feres*, 340 U.S. at 144, 71 S.Ct. at 158). Second, the reasoning employed by the *Chappell* court. The court was acutely aware that it was being asked to countenance a *Bivens* remedy in an area over which Congress exercised plenary constitutional authority, *Chappell,* 103 S.Ct. at 2365-67. Moreover, the decision in *Chappell* was informed by the existence of (1) statutes regulating military life; (2) a comprehensive military justice system; and (3) a civilian board which is empowered to review a serviceman's military record. *Id.* at 2366-67. Surely these factors are analogous to the first two *Feres* doctrine rationales. Third, even if the *Chappell* court had completely ignored these rationales, which it did not, we would be hard pressed to infer from that fact a "disavowal" of them. In *Chappell* the named defendants were individual naval officers, not the United States. Therefore, it is arguable that the rationale concerning the distinctively federal relationship between the United States and its servicemen is inapposite. Also, the failure to discuss a military compensation system for injuries or death would be understandable given the fact that this system hardly could be used as a substitute for money damages for racial discrimination. In short, we are not able to read *Chappell* as broadly as does the plaintiff.

[5] The Government correctly notes that the Coast Guard is considered to be a military service and branch of the armed forces at all

civilian employees of the FAA who were acting in purely civilian capacities when the alleged tort occurred is, in the Government's view, wholly irrelevant. Although we reach the result sought by the plaintiff, we need not decide whether the approach she advances is appropriate when the tort sued upon is based on the conduct of a member of the military.[6] We also decline the Government's invitation

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times, 14 U.S.C. § 1, and that when serviceman Johnson was killed he was fulfilling one of the Coast Guard's primary duties. By statute, the Coast Guard is required to establish and maintain "rescue facilities for the promotion of safety on . . . the high seas and waters subject to the jurisdiction of the United States." *Id.* § 2. To discharge this responsibility, the Coast Guard is authorized to "perform any and all acts necessary to rescue and aid persons and protect and save property." *Id.* § 88(a)(1). The unique facts of this case, however, present a rather interesting wrinkle. Absent a declaration of war or presidential directive, the Coast Guard is a service in the Department of Transportation, not the Navy. *Id.* §§ 1 & 3. As a consequence, serviceman Johnson and the alleged tortfeasors were employees of the same department. *See infra* note 10.

[6] As we understand it, plaintiff's position is that even if the serviceman's injuries are caused by the negligence of others in the military, the court should examine the facts of the case to see if maintenance of the suit would threaten the military disciplinary structure. A review of the law in this area reveals that this position has its advocates. The Ninth Circuit, for example, in *Johnson* v. *United States,* 704 F.2d 1431 (9th Cir. 1983), did conduct such an inquiry in determining whether an active duty serviceman who was injured by another active duty serviceman was engaging in activities incident to his service at the time of his injury. After discounting the first two rationales for the *Feres* doctrine as set forth in *Stencel,* the *Johnson* court stated that "the necessity of safeguarding military discipline provides the most fundamental rationale for limiting recovery under the FTCA to injuries that are not incident to military service." *Id.* at 1436. After viewing the facts of the case "in light of [this] underlying disciplinary rationale." *id.,* the court allowed the FTCA claim to proceed, since "the civil litigation of negligence claims such as Johnson's could not possibly have any effect whatsoever on military discipline." *Id.* at 1439; *see Lee* v. *United States,* 261 F.Supp. 252, 256 (C.D.Cal.1966) (cited in *Stanley,* 639 F.2d at 1152), *rev'd,* 400 F.2d

558 (9th Cir. 1968), *cert. denied,* 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969); *Downes* v. *United States,* 249 F.Supp. 626, 628 (E.D.N.C. 1965) (To determine whether a serviceman was injured incident to military service, the real question is: "Was plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom?"), *see also Brown,* 739 F.2d at 366 (To decide whether a serviceman was engaged in activity incident to service when injured, the court must "examine the facts of each case . . . and determine whether they fall within the reasons given by the Supreme Court for its conclusion in *Feres.*") (quoting *Miller* v. *United States,* 643 F.2d 481, 493 (8th Cir. 1981) (en banc)); *cf. Stanley,* 639 F.2d at 1152 (serviceman's FTCA claim barred by *Feres* doctrine in part because "the relationship betweeen [the plaintiff] and the alleged negligent individuals stemmed from their official military relationship"). *But see Torres* v. *United States,* 621 F.2d 30, 32 (1st Cir. 1980) (*Feres* doctrine bars FTCA suit "even in the absence of a clear nexus between the injury and military discipline") (citing *Hall* v. *United States,* 451 F.2d 353 (1st Cir. 1971)); *Uptegrove* v. *United States,* 600 F.2d 1248 (9th Cir. 1979), *cert. denied,* 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980); *United States* v. *Lee,* 400 F.2d 558 (9th Cir. 1968), *rev'g* 261 F.Supp. 252 (C.D.Cal. 1966), *cert. denied,* 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969).

Sound as this approach might be, we do not feel it is necessary in this instance because we are not faced with a typical *Feres* factual paradigm. We do note that some courts have not embraced a case-by-case inquiry into whether allowing a particular suit would threaten military discipline. *See Hunt,* 636 F.2d at 599 n.51; *Hall,* 451 F.2d at 354 ("If every injury 'aris[ing] out of or . . . incident to service.' [*Feres*], 340 U.S. at 146, 71 S.Ct. at 159, must invite inquiry, not only would the difficulties of what, legally, would constitute discipline-connected be substantial, but the Armed Services would be faced with maintaining a claims department."). Arguably, *Parker,* 611 F.2d 1007, also suggests that any such case-by-case inquiry is inappropriate when the alleged tortfeasor is a member of the armed services. *See infra* pp. 1537-1538. We feel free to conduct such an inquiry here, however, since we must determine "whether, *as a general question of law,* the *Feres* doctrine should be extended to" (*Hunt,* 636 F.2d at 599 n.51 (emphasis added)), a factual situation radically different from the typical *Feres* doctrine case, where the alleged tortfeasor is a member of the armed services. *See infra* pp. 1538-1539. The alleged tortfeasor here is a civilian.

to affirm the district court in automaton fashion.

*Parker,* 611 F.2d 1007, is the appropriate analytical point of departure. In that case, Parker, an off-duty serviceman who was driving a civilian vehicle to his off-base home, was killed in a collision with a military vehicle driven by another serviceman. The accident occurred on an army maintained road within the confines of the military base where Parker was stationed. Earlier that day, Parker had received permision to be away from his duties for the next four days. The court framed the issue as whether, in these circumstances, Parker was engaged in activities incident to his military service at the time of his death. *Id.* at 1009. After examining Parker's duty status at the time of the accident, the location of the accident, and what he was doing when the accident happened, the court concluded that the wrongful death action was not barred by the *Feres* doctrine. *Id.* at 1013-15.

Both parties rely on *Parker* in support of their positions.[7] Contrary to plaintiff's understanding of that decision, however, the *Parker* court did not hold as it did because allowance of the suit would not directly implicate any of the *Feres* doctrine rationales as elucidated in *Stencel.* Rather, the court specifically noted that the "Distinctively Federal Character" and "Relation of Soldier to Superiors" rationales are more relevant to the

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[7] Plaintiff argues that lurking between the lines in *Parker* is a rejection of the first two factors identified in *Stencel* as supporting the *Feres* doctrine, even though the *Parker* court acknowledged that *Stencel* "reaffirmed that the doctrine lives." *Parker,* 611 F.2d at 1010. Since maintaining the suit in *Parker* was seen as not interfering with military discipline, *see id.* at 1013, and the FTCA suit was allowed in that case, plaintiff suggests that *Parker* dictates the same result here. Predictably, the Government views *Parker* as support for its position because, unlike the situation in that case, plaintiff's decedent was piloting a Coast Guard helicopter pursuant to orders from his superiors at the time of his death. The simplicity of both positions is appealing, but *Parker* stands for neither position.

wisdom of implying an exception to the FTCA in the first instance, than they are to determining whether, given a particular factual situation, a serviceman was injured "incident to service." *Id.* at 1012-13. Similarly, the alternative compensation rationale was of no particular relevance to the court's inquiry since the compensation system is deemed to be the exclusive remedy for a serviceman's injuries only when the injuries are a result of activity that is incident to service. *Id.* at 1012.

This does not mean, however, that *Parker* supports the Government's position. The facts in *Parker,* and nearly all the cases decided by reference to *Feres,* involved the typical *Feres* factual paradigm—an FTCA suit for injuries or death allegedly caused by the negligence of a serviceman or an employee of the armed forces. *See, e.g. Brooks,* 337 U.S. at 50, 69 S.Ct. at 919 (negligence of civilian employee of the United States Army); *Feres,* 340 U.S. at 138, 71 S.Ct. at 155 ("negligence of others in the armed forces"); *Brown,* 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139 (negligence of Veterans Administration medical personnel). As we see it, the teaching of *Feres* and its progeny, notably *Parker,* is that when the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service. *See Feres,* 340 U.S. at 146, 71 S.Ct. at 159. If, however, the alleged tortfeasor is not a member of the armed forces or a civilian employee engaged in activities usually associated with the armed forces, we conclude that a court should consult the *Feres* doctrine rationales as set forth in *Stencel* "to determine to what extent, if any, allowance of [the] claim would circumvent the purposes of the [FTCA] as . . . construed by the [Supreme] Court." *Stencel,* 431 U.S. at 670, 97 S.Ct. at 2057. This approach is not novel. The Supreme Court, in those situations not fitting neatly into the *Feres* factual paradigm, has found it entirely appropriate to inquire if the doctrine's rationales

applied with equal vigor to the facts before is so as to justify immunizing the government or a governmental official from liability. The *Chappell, Stencel,* and *Muniz* courts employed this analysis.

Our decision to employ such an approach is further buttressed by a particularly instructive case, *Hunt v. United States*, 636 F.2d 580 (D.C.Cir.1980). In *Hunt*, three plaintiffs brought suit alleging that mandatory swine flu inoculations received while on active duty caused them serious illness. As in this case, a rigid literal reading of *Feres* would have required barring the plaintiffs' claims against the United States since the plaintiffs were on active duty when required to do that which eventually caused them the harm sued upon. Yet the *Hunt* court resisted the temptation to automatically extend the *Feres* bar to a factual situation not akin to the *Feres* factual paradigm.[8] The court instead found that the *Feres* doctrine was not directly applicable. *Id.* at 597. It therefore felt impelled to "examine the policies on which the [*Feres*] doctrine rests to determine whether its application would be appropriate," *id.*, given the unique facts presented. The court concluded that none of the policies behind the *Feres* doctrine, "[a]s recapitulated in *Stencel,*" *id.*, supported exempting the

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[8] Briefly put, the swine flu imminization program established that a claim otherwise available against the manufacturer of the vaccine could be brought against the United States as a substitute party defendant. *Hunt,* 636 F.2d at 592. The *Hunt* court viewed this situation as materially different from that which would be presented if the servicemen alleged they had been injured by *fellow members of the armed services.* If the alleged tort had been committed by a fellow serviceman, the *Feres* doctrine *would* bar suit against the United States. *Id.* at 595 n. 40, 596 n. 42.

Government from liability simply because the United States was the defendant, and accordingly held that the doctrine was no bar to governmental liability.[9] *Id.* at 597-600.

We also conclude, employing this analysis, that the *Feres* doctrine does not bar plaintiff's FTCA claim. This much-maligned doctrine, as we have seen, is best explained by the desire to avoid civilian court inquiry into matters that the Supreme Court views as best left beyond the pale of judicial scrutiny. This desire is understandable, given the fact that "the military is, of necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). Recognizing the uniqueness of the military, the Supreme Court has consistently been chary of countenancing civilian court litigation brought by servicemen against fellow soldiers or superior officers. For example, the court recently reasoned that "the need for unhesitating and decisive action by military officers and equally disciplined

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[9] The *Hunt* court's reasoning was recently echoed by the Ninth Circuit in *Brown v. United States*, 715 F.2d 463 (9th Cir. 1983), another case involving a serviceman's suit against the Government for injuries allegedly resulting from mandatory swine flu inoculation. The court relied extensively on *Hunt* and its earlier decision in *Johnson*, 704 F.2d 1431, *see infra* note 6, to hold that the serviceman's suit was not barred by the *Feres* doctrine. The Fifth Circuit, in *Scales* v. *United States*, 685 F.2d 970, 971 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983), held that the *Feres* doctrine barred an infant's FTCA suit alleging that he was born with congenital rubella syndrome as a result of negligent medical treatment his mother received while on active duty in the Air Force. It reached this result, however, by utilizing the same analysis that the *Hunt* and *Brown*, 715 F.2d 463, courts utilized. *See Scales*, 685 F.2d at 973 ("*Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant.").

responses by enlisted personnel," *Chappell*, 103 S.Ct. at 2367, militated against exposing officers sued by their subordinates to a *Bivens* remedy. *Id.* In *Stencel*, the court disallowed third-party indemnity claims against the United States arising out of service-connected injuries to soldiers, in part because "[t]he trial[s] would . . . involve second-guessing military orders, and would often require members of the Armed Service to testify in court as to each other's decisions and actions." *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2059. Similarly, the *Brown* court expressed its concern over the effect intramilitary litigation might have on discipline, particularly when the suit involved "negligent orders given or negligent acts committed in the course of military duty." *Brown*, 348 U.S. at 112, 75 S.Ct. at 143. The common thread running through these cases is the reluctance to upset, via the civilian forum, the delicate relationships which must exist for the military system to properly function.

With these principles in mind, we have little difficulty concluding that the *Feres* doctrine does not bar plaintiff's FTCA suit. The complaint in this case alleges that plaintiff's decedent was killed because civilian FAA air traffic controllers negligently guided the helicopter he was piloting into a mountain. There is absolutely no hint in the scant record before this court that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial.[10] Nor is

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[10] Although we have no cause to doubt that the FAA could have been placed under the direct control of the armed forces, the fact remains that Congress chose to make the FAA a civilian administration within the Department of Transportation. *See* Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S. Code Cong. & Ad. News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(a)) (revising without substantive change 49 U.S.C. § 1341(a)). It bears mentioning that the Administrator of the FAA *must* be a civilian, and if the Administrator is a former regular officer of an armed service, the Deputy Administrator may not be an officer on active duty in an armed service, a

there a suggesion that examining the conduct of a civilian would in any way implicate the military services. Since the prosecution of plaintiff's claim cannot conceivably involve or compromise a military relationship or, for that matter, the military disciplinary structure, the prosecution of plaintiff's claim will not encroach upon the rationale which "serves largely if not exclusively as the predicate for the *Feres* doctrine." *Hunt*, 636 F.2d at 599. We therefore are unable to discern any sound reason for barring plaintiff's suit under the *Feres* doctrine.[11]

We acknowledge that the Ninth Circuit, in a case strikingly similar to this one, has reached the opposite conclusion. In *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir.1979), *cert. denied*, 444 U.S. 1044, 100 S.Ct. 732, 62 L.Ed.2d 730 (1980), a Navy lieutenant flying home on leave as a military space available passenger aboard an Air Force C-141 transport was killed when it crashed into a mountain. His wife brought a negligence action against the United States and three FAA air traffic controllers. The Ninth Circuit, concluding that the lieutenant was killed while engaging in activity incident to service, held that the *Feres* doctrine barred the suit. The court reasoned

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retired regular officer in an armed service, or a former regular officer in an armed service. Act of Jan. 12, 1983, Pub.L. No. 97-449, 1982 U.S. Code Cong. & Ad. News (96 Stat. 2413) (2416) (to be codified at 49 U.S.C. § 106(c) & (d)) (revising without substantive change 49 U.S.C. §§ 1341(b), 1342(b), and 1652(c)(2)).

[11] As we have seen, the military discipline rationale for the *Feres* doctrine, first offered by the Supreme Court in *Brown*, 348 U.S. 110, 75 S.Ct. 141, 99 L.Ed. 139, has come to be viewed as the doctrine's "best explanation." *See Chappell*, 103 S.Ct. at 2365; *Muniz*, 374 U.S. at 162, 83 S.CT. at 1857. We have not discovered any Supreme Court case decided since the *Brown* court's amplification of the *Feres* decision suggesting that we should extend the doctrine to bar a suit which cannot conceivably impinge on the military disciplinary structure.

that the Supreme Court has never indicated that the *Feres* doctrine applies only to situations involving a threat to military dicipline, *Uptegrove*, 600 F.2d at 1250 (citing *United States v. Lee*, 400 F.2d 558, 564 (9th Cir.1968), *cert. denied*, 393 U.S. 1053, 89 S.Ct. 691, 21 L.Ed.2d 695 (1969)), and the focus in a *Feres* doctrine case should be solely on the serviceman's military status, not the status of the tortfeasor. *Uptegrove*, 600 F.2d at 1251 (citing *Lee*, 400 F.2d at 562).

With all due respect to the Ninth Circuit, it is our view that *Uptegrove* was wrongly decided. As an initial matter, the court accorded no weight at all to the fundamental fact that in *Stencel, Brown, Feres*, and *Brooks*, the relevant Supreme Court benchmarks antedating the *Uptegrove* decision, the alleged tortfeasor was a serviceman or an employee of the military, not an employee of a civilian branch of the Government performing a civilian task. Ignoring this distinction and blindly applying a rule to a factual scenario materially different from that which spawned the rule itself "has the virtue of easy application, [but is not] the better jurisprudential course." *Brown*, 739 F.2d at 366 (quoting *Miller v. United States*, 643 F.2d 481, 493 (8th Cir.1981) (en banc)). Moreover, the Ninth Circuit's statement that a threat to military discipline need not be present for *Feres* to apply reveals a misunderstanding of the third rationale for the *Feres* doctrine.[12] By definition, whenever the lawsuit is based on injuries incurred incident to service, and the *Feres* factual paradigm is present, the "military discipline" rationale *is* implicated because the Supreme Court "has found it unseemly to have military personnel, injured incident to service, asserting

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[12] We also doubt that the Ninth Circuit, if faced with the *Uptegrove* fact pattern today, would be so rigid in its analysis. *See supra* notes 6 & 9 for a discussion of *Johnson*, 704 F.2d 1431, and *Brown*, 715 F.2d 463, recent Ninth Circuit cases which emphasized the military discipline rationale for the *Feres* doctrine.

claims that question the propriety of decisions or conduct by fellow members of the military." *Hunt*, 636 F.2d at 599. Additionally, in the post-*Brown* Supreme Court cases where the *Feres* doctrine was consulted for guidance, the doctrine's third rationale figured prominently in the court's decisions. *See Chappell*, 103 S.Ct. at 2365, 2367; *Stencel*, 431 U.S. at 673, 97 S.Ct. at 2058; *Muniz*, 374 U.S. at 162-63, 83 S.Ct. at 1857-58. Finally, while the Ninth Circuit's position that the status of the tortfeasor need not be examined may be defensible when the *Feres* factual paradigm is present, it is not as defensible when the facts permit the court to decide whether to imply an exception to the FTCA. *Cf. Feres*, 340 U.S. at 142, 71 S.Ct. at 157 (Court, when discussing analogous private liability, cautioned against "ignor[ing] the status of both the wronged and the wrongdoer").

**CONCLUSION**

Despite the barrage of criticisms leveled at the *Feres* doctrine and its theoretical predicates over the years, the fact remains that it still is the law.[13] We accordingly must adhere to it until instructed to do otherwise by the Supreme Court or Congress. That does not mean, however, that we should blindly hand to the Government judicially-created immunity from suit in a factual situation not present in, nor contemplated by, the *Feres* decision. Having determined that the principal *raison d'etre* of the *Feres* doctrine will not be implicated by allowing plaintiff to pursue her claim against the Government, we decline to extend the doctrine to bar her suit. Therefore, the fact that

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[13] It should be noted that the Supreme Court recently accepted an invitation to revisit the *Feres* doctrine. See *Shearer* v. *United States*, 723 F.2d 1102 (3d Cir. 1983), cert. granted, ____ U.S. ____, 105 S.Ct. 321, 83 L.Ed.2d 259 (1984).

serviceman Johnson was killed while on a Coast Guard mission is simply not controlling. We are mindful of an observation made by the Supreme Court in a related context: "There is no justification for this court to read exemptions into the [FTCA] beyond those provided by Congress. If the [FTCA] is to be altered that is a function for the same body that adopted it." *Muniz*, 374 U.S. at 166, 83 S.Ct. at 1859 (quoting *Rayonier*, 352 U.S. at 320, 77 S.Ct. at 377).

The judgment of the district court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 83-5764
D.C. Docket No. 82-06748

FRIEDA JOYCE JOHNSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF HORTON WINFIELD JOHNSON, FOR HERSELF AND FOR THE BENEFIT OF KEVIN LEE NIX, CYNTHIA ANN JOHNSON AND TAMARA JOYCE NIX, PLAINTIFFS-APPELLANTS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

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JUDGMENT ON REHEARING EN BANC

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Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

This cause came on to be heard on rehearing en banc, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED;

It is further ordered that defendant-appellee pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JOHNSON, Circuit Judge, dissented and filed an opinion, in which RONEY, TJOFLAT and HILL, Circuit Judges join.

Entered: January 13, 1986

For the Court: Spencer D. Mercer, Clerk

By: /s/WARREN A. GODFREY

Deputy Clerk

ISSUED AS MANDATE: Feb. 5, 1986

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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CASE NO. 82-6748-CIV-JAG

FRIEDA JOYCE JOHNSON, ETC., PLAINTIFFS,

*v.*

UNITED STATES OF AMERICA, DEFENDANT.

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[Filed: Oct. 26, 1983]

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**ORDER**

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THIS CAUSE has come before the Court for review upon the Plaintiffs' Motion for Rehearing which was granted by this Court on June 15, 1983. Upon consideration of the Plaintiffs' Memorandum in Support of Rehearing filed June 5, 1983 and Plaintiffs' Notice of Supplemental Authority filed September 19, 1983, it is

ORDERED AND ADJUDGED that upon reconsideration and rehearing of this cause, it is hereby ordered that

(1) The prior order of this Court of April 4, 1983 dismissing this case with prejudice is hereby ratified and confirmed.

(2) This cause is hereby DISMISSED with prejudice pursuant to the authority of *Feres* v. *United States*, 340 U.S. 135 (1950).

DONE AND ORDERED in chambers at Fort Lauderdale, Florida, this 20th day of October, 1983.

/s/ JOSE A. GONZALEZ, JR.
United States District Judge

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